

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

METLIFE BANK, N.A.

Plaintiff,

V.

PATRICK G. RILEY, *et al.*

Defendants.

3:10-cv-00122-ECR-VPC

ORDER

October 13, 2010

Before the court is Patrick G. Riley, John Badostein, and Eagle Home Mortgage of California, Inc.’s (“defendants”) motion for rule 11 sanctions (#21)¹ against MetLife Bank Plaintiff). Plaintiff opposed (#26), and defendants replied (#30). Plaintiff also filed a motion to all declarations attached to defendants’ motion for rule 11 sanctions (#27). Defendants denied (#31). Upon thorough review of the motions, the court denies defendants’ motion for sanctions (#21), and also denies as moot plaintiff’s motion to strike all declarations attached to defendants’ motion for sanctions (#27).

I. FACTUAL & PROCEDURAL BACKGROUND

On March 2, 2010, plaintiff filed a complaint against defendant which includes the following claims: (1) breach of contract by all individual defendants, (2) breach of fiduciary duty and/or the duty of loyalty by defendants Havill and Riley, (3) breach of the covenant of good faith and fair dealing by all individual defendants, and (4) tortious interference by defendant Eagle Home Mortgage of California (#1, p. 9-17). On July 16, 2010, following initial discovery and an informal warning to plaintiff regarding defendants' intention to file a motion for sanctions, defendants sent a notice letter with an attached motion for Rule 11 sanctions to plaintiff via email and U.S. mail, but did not file the motion with the court in accordance with Rule 11's safe harbor provision (#27-1, p.1-2). Defendants primary contention is that plaintiff lacks adequate evidentiary support for its

Refers to the court's docket numbers.

1 contentions regarding individual defendants' conduct following their departures from MetLife Bank
 2 (#21, p. 3).² Defendants marked the unsigned motion sent to plaintiff via email, "draft" in the
 3 signature line on the final page (#26-8, p. 20). Additionally, defendants did not attach Josh
 4 Badostein's or Christine Laxague's declarations to the motion, though defendants referenced these
 5 declarations throughout the motion (#26-9).

6 In response to the draft motion, plaintiff sent defendant an email on July 29, 2010, requesting
 7 the missing declarations. *Id.* Plaintiff reiterated this request in its letter sent to defendants on August
 8 6, 2010 (#26-10). Additionally, in this letter plaintiff noted that absent proper service on plaintiff
 9 of the motion for sanctions, the safe harbor provision of Rule 11 is not satisfied and defendant may
 10 not file a motion for sanctions with the court. *Id.* Plaintiff argues that service is not proper because
 11 defendants provided an unsigned, draft motion and failed to attach declarations. *Id.* Defendants
 12 disagree with this contention, arguing that Rule 11 simply requires service of the proposed motion
 13 on opposing counsel twenty-one days prior to filing the with the court (#30, p. 7). Additionally,
 14 defendants believe it is unnecessary to serve documents supporting the motion under Rule 11, as the
 15 language of the Rule simply provides that "the motion must be served," and does not explicitly state
 16 that the motion must include declarations or other attachments. *Id.* at 8-9. As a result of this
 17 disagreement, plaintiff did not receive the declarations until August 20, 2010, when defendants filed
 18 the motion with the court (#27, p. 4).³

19 On August 20, 2010, defendants filed the instant motion for sanctions with the court (#21).
 20 The final, filed motion includes declarations from Mr. Badostein and Ms. Laxague, among other
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22 ² The court notes that the majority of the briefing on this matter addresses the substantive
 23 evidentiary issues that are the subject of the sanctions motion. However, the court declines to summarize
 24 the details of those contentions as the threshold issue of whether defendants satisfied the Rule 11 safe harbor
 25 provisions is controlling in this case.

26 ³ Plaintiff also addressed substantive arguments regarding evidentiary support for its claims
 27 in its August 6 letter (#26-10). Plaintiff clarified that it did not intend to seek a breach of contract claim
 28 against defendant Havill. *Id.* at 5. In response to this clarification and plaintiff's objection to the number
 29 of employees defendants claim have resigned from MetLife Bank, defendant revised the draft motion for
 30 sanctions to remove defendant Havill as a movant and to omit the reference to the number of employees (#21-
 31 1, p. 3).

1 attachments. *Id.* Plaintiff filed a motion to strike all declarations attached to the motion for
 2 sanctions on September 17, 2010 (#27). Additionally, in its opposition to defendants' motion for
 3 sanctions, plaintiff seeks attorney's fees incurred in defending against the motion based on plaintiff's
 4 belief that the motion is frivolous and that defendants filed the motion in bad faith (#26, p. 23-27).

5 **II. LEGAL DISCUSSION**

6 **A. Discussion**

7 **1. Fed. R. Civ. P. 11(c)**

8 Federal Rule of Civil Procedure 11(c) outlines the process by which attorneys may seek
 9 sanctions for violations of Rule 11(b). Specifically, Rule 11(c)(2) includes a "safe harbor" provision,
 10 which provides: "The motion must be served [on the opposing party] under Rule 5, but it must not
 11 be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is
 12 withdrawn or appropriately corrected within 21 days after service or within another time the court
 13 sets." The 1993 Committee Notes for Rule 11 provide further guidance regarding the purpose of
 14 the safe harbor provision: "[t]o stress the seriousness of a motion for sanctions and to define
 15 precisely the conduct claimed to violate the rule."

16 The Ninth Circuit "enforce[s] this safe harbor provision strictly." *Holgate v. Baldwin*, 425
 17 F.3d 671, 677 (9th Cir. 2005). Failure to abide by Rule 11's safe harbor provision precludes
 18 sanctions. *See Fed. R. Civ. P. 11(c); Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 826
 19 (9th Cir. 2009) (holding that a district court did not abuse its discretion by declining to make findings
 20 of fact regarding a sanctions motion when the motion was procedurally defective because it did not
 21 comply with the safe harbor provision in Rule 11). In several cases, the court declined to award
 22 sanctions due to safe harbor procedural deficiencies, including failure to abide by the twenty-one day
 23 timing requirement and failure to serve the motion on opposing counsel prior to filing with the court.
 24 *See, e.g., Holgate*, 425 F.3d at 677 (holding that one of several co-defendants did not satisfy the safe
 25 harbor requirements when it failed to provide independent notice of its intention to seek sanctions);
 26 *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (holding that repeated informal warnings of
 27 deficiencies in a complaint do not satisfy Rule 11 requirements and explaining that "it would
 28 therefore wrench both the language and purpose of the amendment to the Rule to permit an informal

1 warning to substitute for service of a motion"); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789
 2 (9th Cir. 2001) (finding that plaintiff's advance warning of defendants objections to a claim did not
 3 satisfy the "strict procedural requirement of Rule 11(c)(1)(A)").

4 Notably, courts find that failure to "serve a copy of the full motion that will be filed with the
 5 Court" does not satisfy the safe harbor provision. *Gidding v. Anderson*, 2009 WL 1631625 (N.D.
 6 Cal. June 9, 2009) (denying defendants' Rule 11 sanctions motion because "[d]efendants filed with
 7 the Court a motion that includes a memorandum of points and authorities, supporting declarations
 8 and exhibits that defendants did not serve at the outset of the safe harbor period"). In fact, the court
 9 in *Truesdell* described the safe harbor requirements as follows: "The movant serves the allegedly
 10 offending party with a *filings-ready motion* as notice that it plans to seek sanctions. After 21 days, if
 11 the offending party has not withdrawn the filing, the movant may file the Rule 11 motion with the
 12 court." *Truesdell v. So. Cal. Permanente Med. Grp.*, 293 F.3d 1146, 1151 (9th Cir. 2002) (emphasis
 13 added).

14 III. ANALYSIS

15 A. Procedural Requirements for the Safe Harbor Provision

16 Plaintiff and defendants disagree about the procedural requirements for the safe harbor
 17 provision in Federal Rule of Civil Procedure 11(c)(2). Plaintiff contends that defendants failed to
 18 satisfy safe harbor requirements when they emailed and mailed an unsigned draft of their sanctions
 19 motion absent declarations referenced throughout the motion (#27, p. 5). Defendants argue that Rule
 20 11 requires service according to Federal Rule of Civil Procedure 5, which they satisfied when they
 21 mailed a draft of the motion to plaintiff's counsel (#30, p. 7). Defendants further assert that they are
 22 not required to sign the draft in order to effect service and that Rule 11 only contemplates service
 23 of the motion itself and not any accompanying declarations. *Id.* at 8-9.

24 Defendants view of the law simply does not comport with the Ninth Circuit's rulings
 25 regarding procedural requirements for the Rule 11 safe harbor provision.⁴ In accordance with
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27 ⁴ The court notes that defendants rely on case law from myriad jurisdictions in their reply
 28 briefing, including the Eighth Circuit, Southern District of New York, District of Puerto Rico, Northern
 District of Ohio, Southern District of Indiana, and Northern District of Iowa (#30, p. 8-9). The court reminds

1 *Holgate*, this court construes strictly the procedural requirements of the safe harbor provision
 2 outlined in Rule 11(c)(2). Therefore, parties must serve opposing counsel with a motion for
 3 sanctions at least twenty-one days prior to filing the motion with the court. In this case, parties do
 4 not disagree that defendants mailed a draft motion more than twenty-one days prior to filing a motion
 5 with the court for sanctions. However, defendants believe the requirements in Rule 11 are satisfied
 6 by serving a draft motion without accompanying declarations. The court disagrees.

7 If the purpose of the safe harbor provision, as explained in the 1993 Committee Notes, is to
 8 “define precisely the conduct claimed to violate the rule,” this court and the Ninth Circuit believe
 9 parties most effectively achieve this goal by providing a “filing-ready motion.” *See Truesdell*, 293
 10 F.3d at 1151. This conclusion is supported by *Gidding*, a case in which the Northern District of
 11 California denied a sanctions motion for failure to serve declarations at the outset of the safe harbor
 12 period—the precise matter at issue in this case. The court cannot conceive of a reason that defendants
 13 declined to provide the declarations referenced in their draft motion upon plaintiff’s requests, but
 14 hopes that such conduct does not reflect a deliberate attempt to impede cooperation between the
 15 parties. Such tactics do not advance litigation and often result in acrimonious disputes between
 16 parties regarding tangential matters. Further, defendants seek an extraordinary remedy in their
 17 motion for sanctions, including dismissal of two claims for relief, striking several paragraphs of the
 18 complaint, and attorney’s fees. Given the detrimental effect that such a ruling would have on
 19 plaintiff’s case, plaintiff deserved the benefit of consideration of a complete motion for sanctions
 20 for the twenty-one day safe harbor period. Therefore, the court denies defendants’ motion for
 21 sanctions for failure to comply with Rule 11(c)(2) procedural requirements. Given the effect of this
 22 ruling, the court also denies as moot plaintiff’s motion to strike the declarations attached to the
 23 motion.

24 **B. Plaintiff’s Request for Attorney’s Fees**

25 Plaintiff requests attorney’s fees for the costs incurred in opposing defendants’ motion for

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 27 defendants that this case is filed in district court in the Ninth Circuit. Therefore, controlling law from the
 28 jurisdiction in which the case appears advances parties’ arguments most effectively and assists the court in
 ruling on the issue. In this case, there is ample applicable Ninth Circuit law so it is unnecessary to seek
 guidance from district courts in other circuits.

1 sanctions. The court denies plaintiff's request because it does not find clear evidence that defendants
 2 filed their motion for any of the nefarious purposes advanced by plaintiffs: "conditioning the court
 3 to buy into their theory of the case," convincing the court that plaintiff's evidence is weak, testing
 4 plaintiff's case, or as an intimidation tactic (#26, p. 24-25). Similarly, though the court does not
 5 address the merits of the motion for sanctions given its procedural deficiencies, the court does not
 6 believe defendants filed the motion in bad faith or that the motion is frivolous. Therefore, plaintiff's
 7 request for attorney's fees is denied. The court encourages plaintiff and defendants to move beyond
 8 this dispute to ensure that discovery is timely completed so that the case may proceed efficiently.

9 **IV. CONCLUSION**

10 Defendants failed to comply with the strict procedural requirements of the safe harbor
 11 provision in Rule 11 when they served plaintiff with a draft motion absent declarations. Failure to
 12 abide by the procedural requirements outlined in Rule 11(c)(2) precludes a motion for sanctions.
 13 Though the court does not reach the substantive concerns at issue in defendants' motion for
 14 sanctions, it does not find that defendants filed the motion in bad faith.

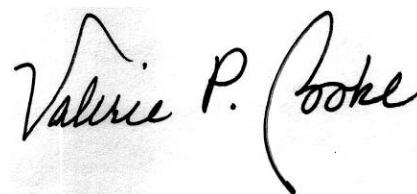
15 **IT IS THEREFORE ORDERED** that defendants' motion for sanctions (#21) is **DENIED**.

16 **IT IS FURTHER ORDERED** that plaintiff's request for attorney's fees incurred in
 17 opposing defendants' motion for sanctions (#26, p. 23-27) is **DENIED**.

18 **IT IS FURTHER ORDERED** that plaintiff's motion to strike declarations attached to
 19 defendants' motion for sanctions (#27) is **DENIED** as moot.

20 **IT IS FURTHER ORDERED** that the motion hearing set for October 19, 2010, is
 21 **VACATED**.

22 **DATED:** October 13, 2010.



23 **UNITED STATES MAGISTRATE JUDGE**

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